

**CHANGES AFFECTING CHAPTER 11 BUSINESS CASES UNDER  
THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 101</b>		
<p>11 U.S.C. §101(14) -</p> <p>(14) "disinterested person" means person that--</p> <p>(A) is not a creditor, an equity security holder, or an insider;</p> <p>(B) is not and was not an investment banker for any outstanding security of the debtor;</p> <p>(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;</p> <p>(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and</p> <p>(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;</p>	<p>The bill modifies sections 101(14)(A) and (E) and eliminates section 101(14)(C) and (D):</p> <p>(14) <b>The term</b> "disinterested person" means a person that--</p> <p>(A) is not a creditor, an equity security holder, or an insider;</p> <p>(B) is not and was not <del>an investment banker for any outstanding security</del> <b>within 2 years before the date of filing of the petition a director, officer or employee of the debtor; and</b></p> <p><del>(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;</del></p> <p><del>(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and</del></p> <p>(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor <del>or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;</del></p>	<p>The changes to section 101(14) eliminate the automatic disqualification of investment bankers and their counsel as interested parties. Investment bankers and their counsel will now be disinterested only if they hold an interest materially adverse to the estate, creditors, or equity security holders such as an unpaid pre-petition claim.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 101 (cont.)</b>		
<p>11 U.S.C. §§101(51)(C)</p> <p>(51)(C) "small business" means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000;</p>	<p>Section 432 of the bill revises the definition of "small business" and creates a definition for "small business debtor".</p> <p><b>51(C) The term "small business" case means a case filed under chapter 11 of this title in which the debtor is a small business debtor.</b></p> <p><b>51(D) The term "small business debtor" -</b>  <b>(A) Subject to paragraph (B), means a person engaged in small business or commercial activities but does not include (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property and or activities incidental thereto) that has aggregate noncontingent liquidated and secured and unsecured debts as of the date of the petition do not exceed \$2,000,000 or the date of the order for relief in an amount not more than \$2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and</b>  <b>(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated and secured and unsecured debts in an amount greater than \$2,000,000 (excluding debt owed to 1 or more affiliates or insiders).</b></p>	<p>A person or entity which engages in business other than owning or operating real estate and which has less than \$2 million in non-insider, non-contingent debt now <i>may</i> be a small business debtor. For the definition to apply, the U.S. trustee must not have appointed a creditors committee. If a committee has been appointed, then the definition no longer applies <i>unless</i> the court determines that the committee is not sufficiently active or representative to provide effective oversight of the debtor. A small business debtor may therefore have reason to go out of its way to encourage a committee's formation, engage it to ensure that it remains active, and even ensure that it can pay for counsel.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 308</b>		
<p>11 U.S.C. §308 -</p> <p>Not previously part of Code</p>	<p>Section 434 of the bill add a new section 308 to the Code:</p> <p><b>§308 Debtor reporting requirements</b></p> <p><b>(a) For purposes of this section, the term `profitability' means, with respect to a debtor, the amount of money that the debtor has earned or lost during current and recent fiscal periods.</b></p> <p><b>(b) A small business debtor shall file periodic financial and other reports containing information including–</b></p> <p><b>(1) the debtor's profitability;</b></p> <p><b>(2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;</b></p> <p><b>(3) comparisons of actual cash receipts and disbursements with projections in prior reports;</b></p> <p><b>(4)(A) whether the debtor is–</b></p> <p><b>(i) in compliance in all material respects with postpetition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and</b></p> <p><b>(ii) timely filing tax returns and other required government filings and paying taxes and other administrative expenses when due;</b></p> <p><b>(B) if the debtor is not in compliance with the requirements referred to in subparagraph (A)(i) or filing tax returns and other required government filings and making the payments referred to in subparagraph (A)(ii), what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and</b></p> <p><b>(C) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11 of this title.</b></p>	<p>Small business debtors will, 60 days after the date on which rules are prescribed to establish forms, be required to report in detail on matters which appear already to be part of the standard Monthly Operating Report form used in the Northern and Eastern Districts of California.</p> <p>What's new here is that the debtor, if not in compliance, must disclose in its reporting all deficiencies and the timing and cost of a plan for cure. Recall that all deficiencies are grounds for dismissal, conversion, or a trustee or examiner.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 341</b>		
<p>11 U.S.C. §341 -</p> <p>(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.</p> <p>(b) The United States trustee may convene a meeting of any equity security holders.</p> <p>(c) The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.</p> <p>(d) Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—</p> <p>(1) the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;</p> <p>(2) the debtor's ability to file a petition under a different chapter of this title;</p> <p>(3) the effect of receiving a discharge of debts under this title; and</p> <p>(4) the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.</p>	<p>Section 402 of the bill adds a new sub-section (e):</p> <p><b>(e) Notwithstanding subsections (a) and (b) the court, on request of a party in interest and after notice and a hearing, for cause may order the United States Trustee not to convene a meeting of creditors or equity security holders if the debtor has filed a plan to which the debtor solicited acceptances prior to commencement of the case.</b></p>	<p>New subsection (e) facilitates the administration of the case of a debtor proposing a pre-packaged plan. The court, after notice and a hearing, may dispense with a meeting of creditors if the debtor has filed a plan and solicited acceptances of the plan prior to the commencement of the case.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 362(n)</b>		
<p>11 U.S.C. §362(n) -</p> <p>Not previously part of Code</p>	<p>Section 441 of the bill adds new section 362(n):</p> <p><b>(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor–</b>  <b>(A) is a debtor in a small business case pending at the time the petition is filed;</b>  <b>(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;</b>  <b>(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or</b>  <b>(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.</b></p> <p><b>(2) Paragraph (1) does not apply–</b>  <b>(A) to an involuntary case involving no collusion by the debtor with creditors; or</b>  <b>(B) to the filing of a petition if–</b>  <b>(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and</b>  <b>(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.</b></p>	<p>There is no stay for small business debtors that file a second, simultaneous small business bankruptcy or, within the 2 years prior to filing a new case, were debtors in a small business case in which there was an order of either dismissal or plan confirmation. There is also no stay <b>for any entity</b>, whether a small business debtor or not, which acquires the assets of a small business debtor from a pending case or a case in the last two years which resulted either in plan confirmation or dismissal.</p> <p>The debtor can prove entitlement to the stay with evidence that (a) the current bankruptcy was involuntary and without collusion, or (b) the current filing resulted from circumstances beyond the control of the debtor and that a feasible plan will be confirmed within a reasonable time. It is worth noting that the specific proscription against use of a liquidating plan in this section, the implication therein that such a plan is “feasible,” and the absence of this term in 1129(a)(11), suggests implicit approval by Congress of the use of liquidating plans in Chapter 11. Cf. however, new section 1112(b)(4)(A).</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1102</b>		
<p>11 U.S.C. §1102 -</p> <p>(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.</p> <p>(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.</p> <p>(3) On request of a party in interest in a case in which the debtor is a small business and for cause, the court may order that a committee of creditors not be appointed.</p>	<p>Section 405 of the bill adds new sub-sections 1102(a)(4) and 1102(b)(3):</p> <p><b>(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection. If the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act). if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.</b></p>	<p>New section 1102(a)(4) empowers the bankruptcy court to order the U.S. trustee to adjust the number of members and the makeup of committees appointed under §1102 to ensure adequate representation. The Amendment specifically authorizes the addition of a "small business concern" to a committee if it holds a particularly large claim in the case for the apparent purpose of minimizing such a concern's expense by permitting it to participate through a committee.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1102 (cont.)</b>		
<p>11 U.S.C. §1102 -</p> <p>(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.</p> <p>(2) A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.</p>	<p>Section 405 of the bill adds a new sub-section 1102(b)(3):</p> <p><b>(b)(3) a committee appointed under subsection (a) shall-</b>  <b>(A) provide access to information for creditors who-</b>  <b>(i) hold claims of-the kind represented by that committee; and</b>  <b>(ii) are not appointed to the committee;</b>  <b>(B) solicit and receive comments from the creditors described in subparagraph (A); and</b>  <b>(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).</b></p>	<p>New subsection 1102(b)(3) requires that a committee provide access to information creditors who are not part of the committee but are represented by it by having similar claims. Committees will now be subject to legal compulsion to make disclosure and report. Consider the effect of this provision on privileged materials.</p>

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<b>11 U.S.C. § 1104</b>		
<p>11 U.S.C. §1104 -</p> <p>(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—</p> <p>(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or</p> <p>(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.</p>	<p>Section 442 of the bill adds new subsections 1104(a)(3), 1104(b)(2), and 1104(e).</p> <p><b>(a)(3) if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or examiner is in the best interests of creditors and the estate.</b></p>	<p>Under new section 1104(a)(3), the grounds for conversion and dismissal will now also justify appointment of a trustee. Many such grounds detailed in section 1112 relate to the pre-confirmation events such as continuing loss or diminution, inability to effectuate a plan, unreasonable and prejudicial delay, failure to propose a plan within the exclusive period and any time fixed by the court, denial of confirmation of every proposed plan as well as all requests for additional time for filing another plan or modification, and non-payment of U.S. trustee fees. Significantly, appointment of a trustee now becomes a mechanism to police the execution of confirmed plans. A trustee may therefore be appointed where revocation of an order of confirmation and denial of confirmation of another plan has occurred, there is an inability to effectuate substantial consummation of a confirmed plan, there has been material default by the debtor with respect to a confirmed plan, a plan terminates by reason of the occurrence of a condition specified in the plan.</p>



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1104 (cont.)</b>		
<p>(b) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.</p>	<p><b>(b)(2)(A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States Trustee shall file a report certifying that election. (B) Upon the filing of a report under subparagraph (A) (i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section, and (ii) the service of any trustee appointed under subsection (d) shall terminate.</b></p>	<p>Under new section 1104(b)(2)(A), provisions regarding the timing of transition from interim trustees and elected trustees are clarified, and the bankruptcy court is explicitly empowered to hear disputes over elections.</p>



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1112</b>		
<p>11 U.S.C. §1112 -</p> <p>(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless--</p> <p>(1) the debtor is not a debtor in possession;</p> <p>(2) the case originally was commenced as an involuntary case under this chapter; or</p> <p>(3) the case was converted to a case under this chapter other than on the debtor's request.</p> <p>(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case</p> <p>under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--</p> <p>(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;</p>	<p>Section 442 of the bill revises section 1112(b) substantially. The amended sub-section is black-lined to show changes:</p> <p> </p> <p>(b)(1)Except as provided in <b>paragraph (2) of this subsection</b>, subsection (c) of this section, <b>and section 1104(a)(3)</b>, on request of a party in interest, <del>or the United States Trustee or bankruptcy administrator</del>, and after notice and a hearing, <del>the court may</del>, <b>absent unusual circumstances specifically identified by the court that establish that the requested conversion is not in the best interests of creditors and the estate, the court shall</b> convert a case under this chapter to a case under chapter 7 <del>of this title or may</del> dismiss a case under this chapter, whichever is in the best <del>interest</del> <u>interests</u> of creditors and the estate, <b>for</b> if the movant establishes <del>cause including (1) continuing loss and diminution and absence of a reasonable likelihood of rehabilitation, (2) inability to effectuate a plan, (3) unreasonable delay . . .</del></p>	<p>Revised section 1112(b) expands “cause” for dismissal or conversion to include many of the common fact patterns into which Chapter 11 debtors fall.</p> <p>The amendment then seeks to restrict the discretion of the bankruptcy court not to dismiss or convert when cause exists, replacing the word “may” with “shall” in section 1112(b)(1) and requiring any denial of a motion to be justified by unusual circumstances specifically identified by the court which establish that the requested relief is not in the best interest of creditors and the estate.</p>



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1112 (cont.)</b>		
<p>(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;</p>	<p><b>(4) For purposes of this subsection. the term "cause" includes-</b></p> <p><b>(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of</b></p> <p><b>(B) gross mismanagement of the estate;</b></p> <p><b>(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;</b></p> <p><b>(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;</b></p> <p><b>(E) failure to comply with an order of the court;</b></p> <p><b>(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;</b></p> <p><b>(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under Rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;</b></p> <p><b>(H) failure timely to provide information or attend meetings reasonably requested by the U.S. trustee (or bankruptcy administrator, if any);</b></p> <p><b>(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;</b></p> <p><b>(J) failure to file a disclosure statement. or to file or confirm a plan, within the time fixed by this title or by order of the court;</b></p> <p><b>(K) failure to pay any fees or charges required under chapter 123 of title 28;</b></p> <p><b>(L) revocation of an order of confirmation under section 1144;</b></p> <p><b>(M) inability to effectuate substantial consummation of a confirmed plan;</b></p> <p><b>(N) material default by the debtor with respect to a confirmed plan;</b></p> <p><b>(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;</b></p> <p><b>(P) Failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.</b></p>	<p>Interestingly, while any "party in interest" has standing to bring a motion under section 1112(b), the amendment removes the U.S. trustee from the list of parties entitled to file. Presumably, this error will not disable the U.S. trustee from filing a motion when justified.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1112 (cont.)</b>		
<p>(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;</p> <p>(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;</p> <p>(7) inability to effectuate substantial consummation of a confirmed plan;</p> <p>(8) material default by the debtor with respect to a confirmed plan;</p> <p>(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or</p> <p>(10) nonpayment of any fees or charges required under chapter 123 of title 28.</p> <p>(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.</p> <p>(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if--</p> <p>(1) the debtor requests such conversion;</p> <p>(2) the debtor has not been discharged under section 1141(d) of this title; and</p> <p>(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.</p>		

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1112 (cont.)</b>		
<p>11 U.S.C. §1112 -</p> <p>(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.</p> <p>(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.</p>		
<b>11 U.S.C. § 1114</b>		
<p>11 U.S.C. § 1114 -</p>	<p>New sub-section (l) replaces former subsection (l) and provides as follows:</p> <p><b>(l) If the debtor, during the 180-day period ending on the date of the filing of the petition-</b>  <b>(1) modified retiree benefits; and</b>  <b>(2) was insolvent on the date such benefits were modified;</b>  <b>the court, on motion of a party in interest, and after notice and a hearing shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.</b></p>	<p>A debtor which modifies its employee benefits within 180 days of a bankruptcy filing, if insolvent at the time of modification, is subject to having the modified benefits reinstated on motion by a party in interest unless doing so would be inequitable.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1115</b>		
<p>11 U.S.C. §1115 -</p> <p>Not previously part of the Code.</p>	<p>New section 1115 provides as follows:</p> <p><b>(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541-</b></p> <p><b>(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first:</b></p> <p><b>(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.</b></p> <p><b>(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.</b></p>	<p>The amendment makes all property acquired and earnings from services rendered post-petition by a Chapter 11 debtor property of the estate, as had been the case for Chapter 13 debtors under 11 U.S.C. section 1306.</p>
<b>11 U.S.C. § 1116</b>		
<p>11 U.S.C. §1116 -</p> <p>Newly added</p>	<p>Section 436 of the bill inserts a new section 1116:</p> <p><b>In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall-</b></p> <p><b>(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief -</b></p> <p><b>(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return,</b></p> <p><b>(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;</b></p>	<p>This section sets forth seven additional requirements for the newly defined “small business debtor” to fulfill as part of its Chapter 11 obligations. Query whether a debtor which initially is a small business debtor must continue to comply with these requirements after it is no longer a small business debtor.</p>



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1116 (cont.)</b>		
	<p>(2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances.</p> <p>(3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;</p> <p>(4) file all post-petition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;</p> <p>(5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;</p> <p>(6) (A) timely file tax returns and other required government filings; and (B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and</p> <p>(7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.</p>	[see above]

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1121</b>		
<p>11 U.S.C. §1121 -</p> <p>(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.</p> <p>(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.</p> <p>(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if--</p> <p>(1) a trustee has been appointed under this chapter;</p> <p>(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or</p> <p>(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.</p> <p>(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.</p>	<p>Sections 411, 437, and 438 of the bill modify and effectively replace 11 U.S.C. section 1121(d) and (e):</p> <p>(d)(1) <b>Subject to paragraph (2)</b> On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.</p> <p>(2)(A) <b>The 120-day period specified in paragraph 1 may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.</b></p> <p>(B) <b>The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.</b> <del>(e) In a case in which the debtor is a small business and elects to be considered a small business--</del>(1) <b>only the debtor may file a plan</b></p>	<p>In all cases, the 120-day exclusive period for filing a plan may not be extended beyond 18 months after the date of the order for relief, and 180-day period for confirmation may not be extended for a period exceeding 20 months after that date.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1121 (cont.)</b>		
<p>(e) In a case in which the debtor is a small business and elects to be considered a small business--</p> <p>(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;</p> <p>(2) all plans shall be filed within 160 days after the date of the order for relief; and</p> <p>(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may--</p> <p>(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and</p> <p>(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.</p>	<p><b>(e) In a small business case -</b></p> <p><b>(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is (A) extended as provided by this subsection, after notice and a hearing; or</b></p> <p><b>(B) the court, for cause, orders otherwise;</b></p> <p><b>( 2 ) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief- and</b></p> <p><del>(3) on request of a party in interest made within the time periods specified in paragraphs (1) and (2)- and after notice and a hearing and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if-</del></p> <p><del>(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and</del></p> <p><del>(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.</del></p> <p><b>(A) the debtor, after providing notice to parties in interest (including the United States trustee) demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;</b></p> <p><b>(B) new deadline is imposed at the time the extension is granted; and</b></p> <p><b>(C) the order extending time is signed before the existing deadline has expired.</b></p>	<p>In a small business case, the absolute deadline for filing the plan and disclosure statement is set at 300 days after the order for relief.</p> <p>In order to obtain an extension of exclusivity, the small business debtor must demonstrate by a preponderance of the evidence that the court will confirm a plan. In a departure from current law, the order for extension must be signed before the prior period of extension expires.</p> <p>If the deadlines for exclusivity expire without either an order for extension or filed plan and disclosure statement, it would appear that no plan can be confirmed and cause would probably exist for dismissal or conversion under new section 112(b)(4)(J).</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1123</b>		
<p>11 U.S.C. §1123 -</p> <p>(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--</p> <p>(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;</p> <p>(2) specify any class of claims or interests that is not impaired under the plan;</p> <p>(3) specify the treatment of any class of claims or interests that is impaired under the plan;</p> <p>(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;</p> <p>(5) provide adequate means for the plan's implementation, such as--</p> <p>(A) retention by the debtor of all or any part of the property of the estate;</p> <p>(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;</p> <p>(C) merger or consolidation of the debtor with one or more persons;</p> <p>(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;</p> <p>(E) satisfaction or modification of any lien;</p> <p>(F) cancellation or modification of any indenture or similar instrument;</p> <p>(G) curing or waiving of any default;</p> <p>(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;</p> <p>(I) amendment of the debtor's charter; or</p> <p>(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;</p>	<p>The bill adds new section 1123(a)(8):</p> <p>(see below)</p>	<p>(see below)</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1123 (cont.)</b>		
<p>11 U.S.C. §1123 --</p> <p>(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and</p> <p>(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.</p>	<p><b>(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.</b></p>	<p>An individual Chapter 11 debtor must pay whatever portion of his or their personal earnings as is necessary to perform the plan.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1124</b>		
<p>11 U.S.C. §1124 -</p> <p>Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--</p> <p>(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or</p> <p>(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--</p> <p>(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;</p> <p>(B) reinstates the maturity of such claim or interest as such maturity existed before such default;</p> <p>(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and</p> <p>(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.</p>	<p>Sections 1124(2)(A) and 1124(2)(D) have been amended as detailed in the following black-lined draft:</p> <p>Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--</p> <p>(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or</p> <p>(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--</p> <p>(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title <b>or of a kind that section 365(b)(2) expressly does not require be cured;</b></p> <p>(B) reinstates the maturity of such claim or interest as such maturity existed before such default;</p> <p>(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and</p> <p><b>(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and</b></p> <p>(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.</p>	<p>The addition of a reference in section 1124(2)(A) to defaults which section 365(b)(2) expressly does not require be cured seems to add nothing to the statute.</p> <p>Under section 1124(2)(D), in order for a claim to be unimpaired, a plan must now provide the claimant with compensation for actual pecuniary loss arising from non-monetary defaults unless the default arises from a lease of non-residential real property.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1125</b>		
<p>11 U.S.C. §1125 - (a) In this section—</p> <p>(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and</p> <p>(2) "investor typical of holders of claims or interests of the relevant class" means investor having-- (A) a claim or interest of the relevant class; (B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and (C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.</p> <p>(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.</p>	<p>Section 408 and 431 of the bill modify 11 U.S.C. §§ 1125(a), 1125(f), and 1125(g):</p> <p>(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, <del>that would enable</del> <b>including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and</b> a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan <b>and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;</b></p>	<p>Revised section 1125(a)(1) requires a discussion in a disclosure statement of the tax consequences of the plan to the debtor, any successor, <i>and to creditors</i>. The prior practice of making a disclaimer as to such consequences has ended. The change appears to encompass both federal and state tax consequences. Query how a debtor with creditors in multiple states will be able to say anything meaningful and how such statements can be formulated safely without hiring special tax counsel.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1125 (cont.)</b>		
<p>(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.</p> <p>(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable non-bankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.</p> <p>(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.</p>		



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1125 (cont.)</b>		
<p>(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business--</p> <p>(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;</p> <p>(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and</p> <p>(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.</p>	<p><del>(f) Notwithstanding subsection (b), in a case in which the debtor has elected to be considered under section 1121(e) small business <u>case</u> -</del></p> <p>(1) the court may <del>conditionally approve</del> determine that the plan itself provides adequate information and that a separate disclosure statement subject to final approval after notice and <del>a hearing is not necessary</del>;</p> <p><b>(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28;</b></p> <p><b>(3) (A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing.</b> (B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement</p> <p><b>(g) Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable non-bankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable non-bankruptcy law.</b></p>	<p>Revised section 1125(f) offers several alternatives for shortening the approval process for plans in small business cases, including conditional approval of a disclosure statement on standardized forms without a hearing, considering an objection to the adequacy of disclosure concurrently with plan confirmation, and approval of a plan without a disclosure statement if the plan is sufficiently detailed.</p> <p>Revised section 1125(g) permits the post-petition solicitation of any entity which was solicited with a plan pre-petition according to applicable non-bankruptcy law.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1127</b>		
<p>11 U.S.C. §1127 -</p> <p>(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.</p> <p>(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.</p> <p>(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.</p> <p>(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.</p>	<p>The bill adds new sections 1127(e) and 1127(f):</p> <p><b>(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to -</b></p> <p><b>(1) increase or reduce the amount of payments on claims to a particular class provided for by the plan;</b></p> <p><b>(2) extend or reduce the time period for such payments; or</b></p> <p><b>(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.</b></p>	<p>Section 1127(e) permits plan modification at any time before the completion of payments to modify the amount of payments, time period for making payments, or account for payments made outside of the plan. Notably, parties other than the plan proponent may move to modify. It would appear that, as modified, plan payments might also be reduced to account for compensation made on third party guarantees and sources of payment other than property of the estate.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1127 (cont.)</b>		
	<p><b>(f)(1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).</b></p> <p><b>(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.</b></p>	<p>Section 1127(f) specifies that a modified plan filed only becomes the plan when there has been disclosure under section 1125 and court approval. Section 1127(f) goes on to specify that Section 1121 through 1129 will apply to any modified plan. Consider how post-confirmation solicitation to creditors of an amended plan will play out.</p>
<b>11 U.S.C. § 1129</b>		
<p>11 U.S.C. §1129 -</p> <p>(a) The court shall confirm a plan only if all of the following requirements are met:</p> <p>(1) The plan complies with the applicable provisions of this title.</p> <p>(2) The proponent of the plan complies with the applicable provisions of this title.</p> <p>(3) The plan has been proposed in good faith and not by any means forbidden by law.</p> <p>(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.</p>	<p>The Amendment modifies sections 1129(a)(9)(C) and 1129(b)(2)(B) and adds new sections 1129(a)(9)(D), 1129(a)(14), 1129(a)(15), 1129(a)(16), and 1129(e):</p> <p>(see below)</p>	<p>(see below)</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1129 (cont.)</b>		
<p>(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and</p> <p>(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and</p> <p>(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.</p> <p>(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.</p> <p>(7) With respect to each impaired class of claims or interests--</p> <p>(A) each holder of a claim or interest of such class--</p> <p>(i) has accepted the plan; or</p> <p>(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or</p> <p>(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.</p> <p>(8) With respect to each class of claims or interests--</p> <p>(A) such class has accepted the plan; or</p> <p>(B) such class is not impaired under the plan.</p>		

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1129 (cont.)</b>		
<p>(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--</p> <p>(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;</p> <p>(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--</p> <p>(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or</p> <p>(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and</p> <p>(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.</p>	<p>(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim <del>deferred cash payments over a period not exceeding six years after the date of assessment of such claim</del> <b>regular installment payments in cash -</b></p> <p><b>(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;</b></p> <p><b>(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303</b></p> <p><b>(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and</b></p> <p><b>(D) With respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).</b></p>	<p>The mandated treatment for tax claims is modified under section 1129(a)(9)(C) as follows: first, the assessment date of the tax is no longer relevant; instead, all priority tax claims must be paid within 5 years after the date of the order for relief. Use of word "regular" in subsection (C)(i) seems to contemplate that balloon payments will be disfavored. Second, the claim must receive treatment no less favorable than that accorded to the most favorably treated class of unsecured, non-priority claims other than an administrative convenience class. Presumably, favorable treatment will be viewed by considering an amalgam of factors including interest rate, term, and security. A plan may not be confirmable, absent taxing agency consent, as to tax claims when general unsecured creditors receive a higher rate than the statutory rate for overdue installments on real estate.</p> <p>Under new section 1129(a)(2)(D), a tax claim which, but for imposition of a lien, would have section 507 priority, must receive the same treatment afforded to an unsecured priority tax claim under section 1129(a)(2)(C). The practical effect is that the plan treatment of a secured tax claim may no longer exceed 5 years.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1129 (cont.)</b>		
<p>(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.</p> <p>(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.</p> <p>(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.</p> <p>(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.</p> <p>(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.</p> <p>(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:</p> <p>(A) With respect to a class of secured claims, the plan provides--</p> <p>(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and</p>		

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1129 (cont.)</b>		
<p>(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;</p> <p>(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or</p> <p>(iii) for the realization by such holders of the indubitable equivalent of such claims.</p> <p>(B) With respect to a class of unsecured claims--</p> <p>(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or</p> <p>(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.</p> <p>(C) With respect to a class of interests--</p> <p>(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or</p> <p>(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.</p>		

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1129 (cont.)</b>		
<p>(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.</p> <p>(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.</p>	<p><b>(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.</b></p> <p><b>(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan-</b>  <b>(A) the value as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or</b>  <b>(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan or during the period for which the plan provides payments, whichever is longer.</b></p>	<p>Under new section 1129(a)(14), an individual debtor must be current with all post-petition support obligations in order to confirm a plan.</p> <p>New section 1129(a)(15) allows a plan to be confirmed by an individual in a Chapter 11 case though unsecured claimants vote to reject the plan. Confirmation may occur over such an objection if the amount distributed under the plan is not less than (i) the current value of the objecting creditor's allowed claim, or (ii) the projected disposable income of the debtor calculated under section 1325(b)(2) during the first 5 years of plan payments. The debtor with a high secured or priority debt load might then pay little or nothing to unsecured creditors who, prior to the Act, held a virtual veto over the individual debtor's plan.</p>
<b>11 U.S.C. § 1129 (cont.)</b>		



Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
	<p><b>(16) All transfers of property of the plan shall be made in accordance with any applicable provision of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.</b></p> <p>(B) With respect to a class of unsecured claims--            (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or            (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, <b>except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.</b></p> <p style="text-align: center;">. . .</p> <p><b>(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).</b></p>	<p>New section 1129(a)(16) appears to reinforce requirements that all transfers occur according to applicable State law and to clarify that, except where otherwise provided in the Bankruptcy Code, no exemption from such laws may be provided by plan confirmation.</p> <p>The amendment to Section 1129(b)(2)(B)(ii) provides an exception to the absolute priority rule under which an individual Chapter 11 debtor may cram down a dissenting claimant or class of unsecured claimants and retain his or her post-petition earnings and property. This provision seems to benefit the individual debtor with high earning potential but does little to assist the debtor who must base reorganization around the pre-petition assets not recognized in section 1115.</p> <p>The court is required to confirm a timely-filed and confirmable plan by a small business debtor not later than 45 days after filing, absent an extension of exclusivity, to obtain confirmation approved by the Court.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1141</b>		
<p>11 U.S.C. §1141 -</p> <p>(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.</p> <p>(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.</p> <p>(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.</p> <p>(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--</p> <p>(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--</p> <p>(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;</p> <p>(ii) such claim is allowed under section 502 of this title; or</p> <p>(iii) the holder of such claim has accepted the plan; and</p> <p>(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.</p> <p>(d)(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.</p>	<p>Sections 321 and 330 of the bill add new sub-sections 1141(d)(5) and 1141(d)(6):</p> <p>(see below)</p>	<p>(see below)</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1141 (cont.)</b>		
<p>(3) The confirmation of a plan does not discharge a debtor if--</p> <p>(A) the plan provides for the liquidation of all or substantially all of the property of the estate;</p> <p>(B) the debtor does not engage in business after consummation of the plan; and</p> <p>(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.</p> <p>(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.</p>	<p><b>(d)(5) In a case in which the debtor is an individual-</b></p> <p><b>(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;</b></p> <p><b>(B) at any time after the confirmation of the plan, and after notice and a hearing the court may grant a discharge to a debtor who has not completed payments under the plan if -</b></p> <p><b>(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and,</b></p> <p><b>(ii) modification of the plan under section 1127 is not practicable; and</b></p> <p><b>(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that -</b></p> <p><b>(i) section 522(q)(1) may be applicable to the debtor; and</b></p> <p><b>(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).</b></p>	<p>New section 1141(d)(5) delays the discharge for an individual that currently occurs upon confirmation. The individual Chapter 11 debtor earns his or her discharge in one of two ways: first, payments under the plan are completed. Second, after notice and a hearing, the court finds that (i) the amount distributable in a hypothetical Chapter 7 case has been distributed, (ii) the plan cannot practicably be modified, and (iii) the court finds, after notice and a hearing, that the debtor has not been convicted of a felony which demonstrates that the bankruptcy was an abusive filing, and there is not an action pending in which the debtor may be found guilty of a felony, liable for a debt arising from violation of the Securities Exchange Act or a similar state law, criminal act, intentional tort, willful or reckless misconduct resulting in serious injury or death, or a RICO civil penalty.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1141 (cont.)</b>		
	<p><b>(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt-</b></p> <p><b>(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or</b></p> <p><b>(B) for a tax or customs duty with respect to which the debtor-</b></p> <p><b>(i) made a fraudulent return; or</b></p> <p><b>(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.</b></p>	<p>New section 1141(d)(6) makes debts to domestic governmental units obtained by false pretenses, a false representation or actual fraud non-dischargeable under 11 U.S.C. § 523(a)(2)(A) as to corporations. Section 1146(d)(6) also makes such a debt obtained by use of an intentionally and materially false written statement regarding a debtor's financial condition non-dischargeable under 523(a)(2)(B). Presumably an adversary proceeding would be required to determine dischargeability because this section is essentially the reverse of section 523(c), which states that such debts are discharged without a court determination that they are non-dischargeable. Query as to what kinds of debts to governmental agencies might be obtained through the intentional and fraudulent conduct required to prove liability under section 523(a)(2).</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>11 U.S.C. § 1146</b>		
<p>11 U.S.C. §1146 -</p> <p>(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.</p> <p>(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.</p> <p>(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.</p> <p>(d) The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of--</p> <p>(1) the date on which such governmental unit responds to the request under this subsection; or</p> <p>(2) 270 days after such request</p>	<p>The Amendment eliminates sections 1146(a) and (b), renumbering sections (c) and (d) without change.</p> <p><del>(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.</del></p> <p><del>(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.</del></p> <p><del>(c)</del> (a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.</p> <p><del>(d)</del> (b) The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of--</p> <p>(1) the date on which such governmental unit responds to the request under this subsection; or</p> <p>(2) 270 days after such request</p>	<p>The change is made in connection with revisions to 11 U.S.C. section 346 by requiring state and local tax laws to conform to the Internal Revenue Code in areas such as the division of tax liabilities between the estate and debtor tax consequences regarding the transfer of property and as regards partnerships, and the taxable period of a debtor. Dissimilar provisions pertaining to tax year bifurcation and the date on which the bifurcation occurs will be conformed.</p>

Bankruptcy Code Before 2005 Amendment	2005 Amendment	Analysis of Amendment
<b>FRBP 9009</b>		
<p>FRBP Rule 9009-</p> <p>The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code. The forms shall be construed to be consistent with these rules and the Code.</p>	<p>Section 419 of the Amendment proposes amended Bankruptcy Rules in conjunction with FRBP 9009:</p> <p><b>(1) DISCLOSURE- The Judicial Conference of the United States, in accordance with section 2075 of title 28 of the United States Code and after consideration of the views of the Director of the Executive Office for United States Trustees, shall propose amended Federal Rules of Bankruptcy Procedure and in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure shall prescribe official bankruptcy forms directing debtors under chapter 11 of title 11 of United States Code, to disclose the information described in paragraph (2) by filing and serving periodic financial and other reports designed to provide such information</b></p> <p><b>(2) INFORMATION-</b> The information referred to in paragraph (1) is the value, operations, and profitability of any closely held corporation, partnership, or of any other entity in which the debtor holds a substantial or controlling interest.</p> <p><b>(b) PURPOSE-</b> The purpose of the rules and reports under subsection (a) shall be to assist parties in interest taking steps to ensure that the debtor's interest in any entity referred to in subsection (a)(2) is used for the payment of allowed claims against debtor.</p>	<p>It is uncertain how a rule or rules pertaining to entities which are not the debtor might be enforced. A debtor which holds a controlling interest in another entity can certainly be compelled to direct the controlled entity to prepare financial or other unspecified reports. However, might such reporting in a privately held company not result in a breach of the debtor's duties as the controlling shareholder? Moreover, in an entity in which the debtor's interest is only substantial and not controlling, how could disclosure be compelled at all? And if that third party fails to report, is the failure to comply not be grounds for dismissal, conversion or appointment of a trustee or examiner as to the debtor?</p>

<p>11 U.S.C. §365 -</p> <p>(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.</p> <p>(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--</p> <p>(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;</p> <p>(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and</p> <p>(C) provides adequate assurance of future performance under such contract or lease.</p> <p>(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--</p> <p>(A) the insolvency or financial condition of the debtor at any time before the closing of the case;</p> <p>(B) the commencement of a case under this title;</p> <p>(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or</p> <p>(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.</p> <p>(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real</p>	<p>The Act modifies sub-sections 365(b)(1)(A), 365(d)(4), 365(p), and eliminates all references to airport and aircraft leasing.</p> <p>(A) cures, or provides adequate assurance that the trustee will promptly cure, such default <b>other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform non-monetary obligations under an unexpired lease of real property, if it is impossible for th trustee to cure such default by performing non-monetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a non-residential real property lease, then such default shall be cured at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph.</b></p> <p style="text-align: center;">. . .</p>	<p>The addition to section 365(b)(1)(A) states that a debtor must, prior to assumption of a commercial lease, cure only those non-monetary defaults relating to failure to operate as provided under such lease. Non-monetary defaults which are impossible to cure, such as lease prohibitions against "going dark," need not be cured. The debtor's only obligation is to pay the lessor the pecuniary damages incurred. This revision resolves a split among the circuits as to whether all defaults, including non-monetary defaults, have to be cured in order to assume a lease.</p>
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<p>property in a shopping center includes adequate assurance--</p> <p>(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;</p> <p>(B) that any percentage rent due under such lease will not decline substantially;</p> <p>(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and</p> <p>(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.</p> <p>(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.</p> <p>(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--</p> <p>(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or</p>		
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<p>restricts assignment of rights or delegation of duties; and</p> <p>(B) such party does not consent to such assumption or assignment; or</p> <p>(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;</p> <p>(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or</p> <p>(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.</p> <p>(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60- day period, fixes, then such contract or lease is deemed rejected.</p> <p>(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.</p> <p>(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until</p>	<p><del>(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.</del></p>	
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<p>such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.</p> <p>(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.</p> <p>(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of</p>	<p><del>(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject</del> <b>(A) Subject to subparagraph (B)</b> an unexpired lease of nonresidential real property under which the debtor is the lessee <del>within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is</del> <b>shall be</b> deemed rejected, and the trustee shall immediately surrender <del>such that</del> nonresidential real property to the lessor <b>if the trustee does not assume or reject the unexpired lease by the earlier of</b></p> <p><b>(i) the date that is 120 days after the date of the order for relief; or</b></p> <p><b>(ii) the date of the entry of an order confirming a plan.</b></p> <p><b>(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.</b></p> <p><b>(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.</b></p> <p><del>(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an</del></p>	<p>The Act removes the discretion of the bankruptcy court to order extensions of the time to assume or reject non-residential real property leases for more than a single 90-day extension absent written consent of the lessor.</p> <p>The Act seeks to counter-balance the damages caused by improvidently assumed leases which subsequently must be rejected by capping administrative damages under revised section 503(b)(7) at two years future rent.</p>
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<p>a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.</p> <p>(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate--</p> <p>(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;</p> <p>(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or</p> <p>(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.</p> <p>(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to--</p> <p>(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and</p> <p>(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an</p>	<p><del>aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.</del></p> <p><del>(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate--</del></p> <p><del>(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;</del></p> <p><del>(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or</del></p> <p><del>(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.</del></p> <p><del>(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to--</del></p> <p><del>(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and</del></p> <p><del>(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of</del></p>	
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<p>unexpired lease of nonresidential real property.</p> <p>(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.</p> <p>(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.</p> <p>(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.</p>	<p><del>the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.</del></p> <p><del>(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.</del></p> <p><del>(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.</del></p> <p><del>(10)(5)</del></p>	
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<p>(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--</p> <p>(A) the insolvency or financial condition of the debtor at any time before the closing of the case;</p> <p>(B) the commencement of a case under this title; or</p> <p>(C) the appointment of or taking possession by a trustee in a case under this</p> <p>title or a custodian before such commencement.</p> <p>(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--</p> <p>(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and</p> <p>(ii) such party does not consent to such assumption or assignment; or</p> <p>(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.</p> <p>(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under</p>	<p>(f)(1) Except as provided in subsections <b>(b)</b> and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the</p>	
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<p>which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.</p> <p>(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--</p> <p>(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and</p> <p>(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.</p> <p>(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.</p> <p>(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--</p> <p>(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or</p> <p>(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--</p> <p>(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or</p> <p>(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--</p> <p>(i) immediately before the date of such conversion, if</p>	<p>assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; <del>except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.</del></p>	
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<p>such contract or lease was assumed before such conversion; or</p> <p>(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.</p> <p>(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--</p> <p>(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or</p> <p>(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.</p> <p>(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.</p> <p>(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.</p> <p>(D) In this paragraph, "lessee" includes any successor,</p>		
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<p>assign, or mortgagee permitted under the terms of such lease.</p> <p>(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--</p> <p>(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or</p> <p>(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.</p> <p>(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.</p> <p>(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.</p> <p>(2) If such purchaser remains in possession--</p> <p>(A) such purchaser shall continue to make all payments</p>		
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due under such contract, but may, [FN1] offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to

perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach

<p>as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or</p> <p>(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--</p> <p>(i) the duration of such contract; and</p> <p>(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.</p> <p>(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--</p> <p>(A) the trustee shall allow the licensee to exercise such rights;</p> <p>(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and</p> <p>(C) the licensee shall be deemed to waive--</p> <p>(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and</p> <p>(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.</p> <p>(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--</p>		
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<p>(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and</p> <p>(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.</p> <p>(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--</p> <p>(A) to the extent provided in such contract or any agreement supplementary to such contract--</p> <p>(i) perform such contract; or</p> <p>(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and</p> <p>(B) not interfere with the rights of the licensee as provided in <del>such contract, or any agreement supplementary to</del> such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.</p> <p>(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.</p>	<p>(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.</p>	
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	<p>(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d) the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.</p> <p>(2)(A) If the debtor in a case under Chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have its lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.</p> <p>(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notified the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.</p> <p>(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.</p> <p>(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is a lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.</p>	<p>In individual chapter 11 and chapter 13 cases, personal property leases not assumed through a plan or by prior order of the court are deemed rejected upon the conclusion of the hearing on plan confirmation. The doctrine of personal property leases and other contracts passing through chapter 11 for cases other than those of individuals as set forth in <u>In re Catapult Entertainment, Inc.</u>, 165 F.3d 747 (9<sup>th</sup> Cir. 1999) appears to remain in effect.</p>
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